Supreme Court of the United States

NO.

OCTOBER TERM, 1946

LOUISE C. BENNION, Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY, Respondent.

PETITION FOR RE-HEARING

To the Honorable Fred M. Vinson, the Chief Justice of the Supreme Court of the United States, and to the Associate Justices thereof:

The above named petitioner, respectfully petitions this Honorable Court for a rehearing of her petition for writ of certiorari and most earnestly asks the Court to reconsider its action in denying the petition for writ of certiorari herein. This petition for re-hearing may be unorthodox. But we sincerely feel that we are justified and required by the circumstances present here to appeal again to the Court to hear this case. So far as we know, never has this Court been called upon to consider a case with facts akin to this. And such a one will likely never

arise in the future. This case stands alone in its facts and also by reason of the result reached by the Circuit Court of Appeals.

The sacrifice of the life of petitioner's husband, and the irrevocable loss inflicted upon her thereby, entitles her not alone to the gratitude of the nation, but, also, to a hearing of her case on its merits by this Court. Certainly this Court has the power to grant her petition and we respectfully submit that no rigid interpretation of the Court's rules should be allowed to stand in way of the exercise of the Court's discretion to grant what seems to us to be only simple justice, equity and right.

In view of the seriousness of the consequences so far as the petitioner is concerned and the gravity and finality for her of the Court's denial of her petition to be heard, full justice cannot be done without a review by this Court of the Circuit Court's opinion herein. This opinion we sincerely believe is demonstrably unsound and erroneous, and is arrived at by assuming facts not remotely present, and by the erroneous application of concededly correct principles of law. This Court, we sincerely believe, can exercise its sound discretion herein and grant the petition without relaxing its rules. The rules are comprehensive enough to encompass our plea, although it may be that a rigidity of interpretation has narrowed them within confines that resulted in the denial of our petition. So far as petitioner is concerned there are special and important reasons for hearing her, and those reasons are likewise of public concern, unless she is to understand that we are indifferent to the loss she has sustained and the sacrifice of life that has been made for this nation at her cost.

Under Rule 38 paragraph 5 of this Court, while writs of certiorari are not matters of right, they are granted

within the discretion of the Court where there are special and important reasons therefore. Some of the special and important reasons for granting a writ are enumerated by the rule and were advanced in the petition for writ of certiorari filed herein and denied by the Court. The reasons specifically enumerated by the rule are, however, neither controlling nor do they fully measure the Court's discretion under the express language of the rule itself. Your petitioner, therefore, appeals to the Court to exercise its discretion and grant her petition because this case presents, in the honest judgment of petitioner and her counsel, a serious miscarriage of justice and an infliction upon her of an injury and wrong that she should not be called upon to bear, and which this Court alone can correct and prevent.

Interpreting the rules of this Court to deny this petitioner a hearing by this Court, it is seriously and respectfully urged, permits the rules by such interpretation to deny petitioner equal justice from others similarly situated. It is earnestly urged upon this Court that this case presents a situation that entitles the petitioner to a hearing of her case on its merits.

Her husband lost his life by the murderous attack of the Japanese at Pearl Harbor while he was in command of the Battleship West Virginia. She brought her action under her policy against the defendant in the State Courts of Utah. The defendant insisted that it was not liable because "a state of war" existed at the time of insured's death between Japan and the United States. There was no such state of war at that time and it is the utmost sophistry to argue that the situation when insured was killed was war de-facto or war de-jure. There was no war with Japan. On the contrary every effort was being made by this country to avoid war. The president of the

United States, himself, said that at the time Captain Bennion was killed we were at peace with Japan.

The Circuit Court of Appeals in its majority opinion erroneously stated that the deceased was killed "repelling the attack." This is not a fact. He was not repelling an attack, his battleship was not repelling an attack, his government was not repelling an attack and there was no armed conflict of any kind when he was killed.

The defendant, New York Life Insurance Company, removed the case to the federal court for the District of Utah. The federal court for the District of Utah held for the plaintiff, your petitioner, under law long recognized in Utah. The Circuit Court of Appeals reversed by a divided court and refused to apply the law approved by the district court. This Court has said that one purpose of Erie R. Company vs. Tompkins (304 U. S. 64) is to prevent either a plaintiff or defendant from gaining an advantage one over the other by removing a case from the state court to the federal court. In this case defendant gained a decided advantage by the removal. In the absence of pleading and proof to the contrary the law of Utah and the law of Virginia, where this contract was written, are presumed to be the same. Had this case remained in the state courts of Utah, that the plaintiff would have recovered is almost a certainty. Although the Supreme Court of Utah has not passed directly upon the precise questions present here, the federal court did apply the law of Utah that when the insurer has used language susceptible of two interpretations that interpretation favorable to the insured will be adopted. The law of Virginia is the same. The decision of the Circuit Court of Appeals herein, and the defendant's brief show beyond dispute, by their own language and argument, that the word "war" is susceptible of more than one meaning. Not only is it

susceptible of more than one meaning but under the meaning of the word adopted by the Circuit Court of Appeals and argued by the defendant the plaintiff is still entitled to recover, because there was no armed conflict between two nations when her husband was killed. Even if we ignore the formal declaration of war by Congress the day following the deceased's death, there still was no war when he was killed. He was not killed as a result of war. He was murdered.

A further cogent reason why both the Supreme Court of Utah and the Supreme Court of Virginia would have decided against the defendant is because every other court, both state and federal, that has passed upon this precise question has held against the defendant's contentions. We cannot assume that Utah and Virginia would set themselves up as superior to every other court and hold that every other court was wrong.

The defendant appealed to the Circuit Court of Appeals. The Circuit Court the morning this case was called for hearing was composed of two circuit court judges and one federal district court judge. The two circuit court judges disagreed, one holding with plaintiff, one holding against her. The district court judge there also held against her. So, we actually and in fact now have one circuit court judge and one district court judge who have held with the plaintiff and one circuit court judge and one district court judge who have held against her. This very division demonstrates that so far as this case is concerned the policy here is ambiguous, and under those circumstances both Utah and Virginia under their settled law would hold for the plaintiff.

However, even had the Circuit Court unanimously decided against the plaintiff, justice and right should still entitle her to a review of that decision by this Court. The

courts have found in favor of every other beneficiary whose husband or relative was murdered by the Japanese at Pearl Harbor. This petitioner alone upon the same facts has been denied recovery. She has not been treated equally with the others similarly situated. It seems to us that that fact alone entitles this petitioner to a hearing of her case by this Court. Certainly by removing the case to the federal court the defendant has now gained a distinct advantage, and the plaintiff has suffered a distinct loss. If the rules of this Court may be construed to deny her a hearing here we respectfully submit that because of the nature of this case and the circumstances here involved the injustice and discrimination actually resulting to the petitioner justify the exercise of this Court's discretion to humanize the rules and recognize that there are here present special and important reasons why the Court should hear this case. We respectfully submit that the rules should not be so inflexible or narrow as to refuse this petitioner a hearing. The circumstances here are unique, and the situation presented stands alone. The defendant should not be allowed to obtain an advantage over the plaintiff, particularly when so far as federal judges are concerned those judges are equally divided in this case. The federal judge of Utah certainly should at this point be considered as more likely to apply the law of Utah than would the federal district judge of Oklahoma.

The Circuit Court's opinion and the defendant's brief are both based upon assumptions of facts that do not exist here. Although the Circuit Court of Appeals said that "we should place ourselves in the position of the parties when

the contract was made," in fact it did exactly the opposite. Neither of the parties when this contract was made could or did contemplate that the policy would exclude recovery for such an assault as Japan made upon Pearl Harbor. Both parties must have had in mind a situation which everyone would recognize and accept as war. Neither of the parties could have anticipated that such an attack as Pearl Harbor would ever be made, and neither party had in mind that such an attack would constitute war, because no such attack had ever occurred in the history of this nation.

The Circuit Court of Appeals says that if Congress had not been in session and had the president taken measures not only to repel the invasion but to wage an offensive war and the insured had been killed on January 7, 1942, he would have come within the terms of exclusion in the policy. The defendant in its brief here argues that had Captain Bennion been killed by a German shell in a conflict between Germany and Poland he would have been killed as a result of war, or had he been in the Canadian Air Force and been killed in Europe he would have died as a result of war. Neither the argument of the Circuit Court nor the argument of the defendant has any place in this case at all. The hypothesis assumed by the Circuit Court of Appeals might have been armed conflict under the authority of the two governments, and under the hypothesis of the defendant there would have been armed conflict between two governments, and the death would have resulted from such armed conflict, and had the deceased been in the Canadian Air Force he would have been participat-

ing in the armed conflict. None of the hypotheses are fair or relevant here. Captain Bennion was not killed as the result of any armed conflict. We were not engaged in war with Japan nor was the deceased killed as the result of a war in which Japan was engaged with any one. The illustrations given by the Circuit Court of Appeals and the defendant, themselves demonstrate that if that is the kind of war the insurance company had in mind in the policy, then the petitioner is entitled to recover under this policy because the deceased was not killed as a result of any such kind of war.

Upon the same day that this Court denied the petitioner a hearing it granted a petition to hear numerous persons who had been convicted in the courts of Utah. If the rules of this Court grant those people a hearing and deny a hearing to the widow of an American sailor killed and murdered by treacherous attack upon our country, then we respectfully submit a serious question as to the fairness, justice or right of such an interpretation of the rules is presented, and it definitely follows that defendant was astute to remove its case from the state courts of Utah.

Aside from the fact that it is almost impossible to believe that Virginia and certainly not Utah would have held against all the other authorities, and aside from the fact that the Circuit Court of Appeals did ignore a joint resolution of Congress, which action of the Circuit Court we believe then brought into existence a federal question here, it is earnestly urged that the unusual situation presented by this case calls for an exercise by this Court of its discretion to grant this petitioner a hearing. She has not had a complete hearing nor can her case be fairly decided now, except by this Court. She has been distinctly injured by the removal of this case from the state courts of Utah to the United States Courts.

For the foregoing reasons we earnestly urge this court to grant this re-hearing and to grant a writ of certiorari herein.

Respectfully submitted,

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CERTIFICATE

The foregoing Petition for Re-Hearing is presented in good faith and not for delay.

SHIRLEY P. JONES

Attorney for Petitioner